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In The
SUPREME COURT OF THE UNITED STATES
October Term 1962

No. 268

LUTHER ROBINSON MADDOX,
Petitioner,

v.

RAYMOND O. SHROYER
and MARY K. SHROYER, his wife, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH APPENDIX

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DATED: July 21, 1962

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1962

No.....

LUTHER ROBINSON MADDOX,
Petitioner,

v.

(1) RAYMOND O. SHROYER, (2) MARY K. SHROYER, HIS WIFE; (3) JAMES LEWEY CARAWAY, (4) CELIA M. CARAWAY, HIS WIFE; (5) DISTRICT SUPPLY, INC., (6) CHARLES VISEK, INDIVIDUALLY AND AS PRESIDENT THEREOF; (7) FIDELITY INVESTMENT & TITLE CO., INC., (8) JAMES C. CHRISTOPHER, INDIVIDUALLY AND AS SECRETARY THEREOF; (9) OWEN E. OSBORNE; (10) STANLEY VISEK, INDIVIDUALLY AND AS VICE PRESIDENT, TREASURER AND DIRECTOR OF DISTRICT SUPPLY; (11) FRANK GEORGE PORRECA, INDIVIDUALLY AND AS DIRECTOR OF DISTRICT SUPPLY; (12) ELMER L. YOUNG, INDIVIDUALLY AND AS DIRECTOR AND GENERAL MANAGER OF DISTRICT SUPPLY; (13) SAMUEL J. SMITH, INDIVIDUALLY AND AS FORMER ACCOUNTANT OF DISTRICT SUPPLY; (14) ARTHUR J. HILLAND, INDIVIDUALLY AND AS ATTORNEY FOR SHROYERS (Appellees Below),
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Luther Robinson Maddox, prays that a writ of certiorari issue out of this Court to review a judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on April 26, 1962, affirming the judgment of the United States District Court for the District of Columbia, wherein the District Court, which will be called hereinafter the *Trial Court, dismissing the action with prejudice* against all the defendants therein. A petition for a rehearing was duly filed on May 11, 1962, and it was denied on May 21, 1962 (R. 129-137). An order of June 19, 1962, extended further time within which Petitioner might petition for certiorari, to and including July 21, 1962 (R. 186(a)).

OPINION BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit, hereinafter called the *Court Below*, is not yet officially reported, but a copy of such opinion as was served upon Petitioner is annexed hereto as Appendix "A" (R. 124-127). The Pertinent opinions and orders, etc. of the *Trial Court* are shown as Appendices, Annexed hereto, "B", "C", "D", "E", "F", "G", "H", etc.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254(1) and pursuant to Rule 19 of this Court where (1) the *Court Below* has decided this case in conflict with decisions and principles of law laid down not only by this Court, but also by other Circuit Courts of Appeal—and even contrary to the principles established in its own Circuit; and (2) where it has decided important questions of law involving the Federal Rules of Civil Procedure that should be settled by this Court; (3) and where it has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the *Trial Court* as to call for the exercise of this Court's power of supervision; (4) and, further, where it has decided federal questions in conflict with applicable decisions of this Court and well-established law.

The *Trial Court* took jurisdiction under the District of Columbia Code, Title 11-306.

QUESTIONS PRESENTED

1.—Whether the *Court Below* erred:

(a) When it held that the *Trial Court* was amply justified in dismissing the action of Petitioner, with prejudice, against all the defendants in the case on June 1, 1961, and further held that the affirmation of the judgment of the *Trial Court* rendered "moot" the other questions raised by Petitioner as having been erroneously committed by the *Trial Court*;

(b) When it failed to pass on the question as to whether

the *Trial Court* had the power to pass on (under Rule 60(b), FRCP) and set aside the judgment that had stood of record against Respondent Young since May 3, 1958 (R. 26-34);

(c) When it refused to Rehear and reconsider its judgment of April 26, 1962, affirming the summary action and judgment of the *Trial Court* (R. 129-137);

(d) When it failed and refused to take cognizance of the fact that the *Trial Court* flouted and ignored the provisions and requirements of the Federal Rules of Civil Procedure and the Local Rules promulgated and established pursuant to Statutory authority (28 U.S.C., Section 2072);

(e) When it held, in effect, that Petitioner had been afforded *fair hearings* in the *Trial Court* and that he had not been deprived of *due process of law and a jury trial*, by affirming the action of that *Trial Court*, when it entered that drastic and unsound Preclusion Order of June 1, 1961;

(f) When it held in effect that Judge McGuire was not grossly biased and prejudiced throughout his rulings against Petitioner (R. 7-34, 39-42, 121-123);

(g) When it held and dismissed the appeal as against Hilland from the Order of *Trial Court of December 10, 1958* (R. 165-170, 173) and dismissed Counts Eight (8) and Nine (9) against Hilland.

2.—Whether or not the Shroyers submitted themselves for all purposes in this case when they asked for affirmative relief, not only in the *Trial Cou* but also in the *Court Below?* (R. 39-44, 138-145, 172).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, ETC., INVOLVED

The pertinent portions of the Constitutional provisions, Statutes and Rules of Civil Procedure, supplemented by Local Rules of *Trial Court*, are set out as Appendix I and J.

STATEMENT OF THE CASE

This case was filed in May, 1957, against the first nine (9) defendants as shown in the caption and it was attacked by certain defendants (respondents herein); it was amended, as of course, on October 5, 1957, in six (6) Counts, and it was attacked again, by Galiher and Newton's clients, but Judge Holtzoff overruled their objections and they answered the *amended complaint* as it stood, generally denying all material allegations therein (R. 1); and on April 10, 1958, *Counts Seven (7) and Eight (8)* were added bringing in new parties (5), numbers 10 to 14, inclusive, and the various Counts charged the Respondents (defendants in the *Trial Court*), which will be called hereinafter by names, individually, fundamentally and basically, with a malicious conspiracy: (1) to maliciously breach and interfere with contracts of employment between Petitioner and his clients, the Shroyers, written contracts under seal made in the District of Columbia, and (2) to commit maliciously and bring about a breach of implied warranty under an Assignment and Power of Attorney, with full control over, an escrow fund of $17,000.00 held by the Fidelity Company, a Maryland Corporation, doing business in Montgomery County, Maryland; and, further, (3) to commit maliciously abuses of legal processes against this Petitioner, in an Equity Case (No. 17,356) in Mary-

land, all of which was a continuing conspiracy. The contracts of employment were executed by the Shroyers in 1954 (R. 192(27), Exhibits 19-22, incl., see O/R), and the Assignment and Power of Attorney were executed in 1955. The Petitioner was discharged by the Shroyers on September 15, 1956, as a result of the conspiracy charged (R. 189(6)), which was a continuing conspiracy to injure and damage this Petitioner, and thereby to deprive, cheat and defraud Petitioner out of his fees earned and to be earned, under those contracts of employment.

Under those contracts of employment by the Shroyers, Petitioner was engaged to defend an Equity Suit in Montgomery County, Maryland, for the Shroyers, brought in May, 1954, by the District Supply, a Pennsylvania Corporation, doing business in the District of Columbia and Maryland, since January, 1950, and having its main office in the District of Columbia.

In that equity suit Raymond O. Shroyer was charged with illegal conversion of funds of the District Supply, prior to September 1953, when he was an officer and an employee of the District Supply. Mary Shroyer, his wife, was brought into the suit because she was a joint owner (*by the entirety*) of the property attacked. When that Equity Suit was filed against the Shroyers in Maryland, no court in Maryland had any jurisdiction or power to entertain a suit in that State by the District Supply *under the Maryland Code* (See Art. 23, Sections 90 and 91(c). Hence, whatever decrees or orders that court may have entered in the equity case was a nullity (*Moore* v. *McAllister*, 141 A. 2d 176; *Thomas* v. *Hardesty*, 143 A. 2d 618). Cf. *Berlinsky* v. *Eisenberg et al.* (1947), 190 Md. 636.

In that Equity Suit, the District Supply, represented by F. Archie Meatyard, Jr., a United States Commissioner, and Richard W. Galiher, both resident of Montgomery County, claimed illegal conversion of some $22,000.00, and asked for an injunction to stop the sale of some real estate that had been advertised for sale by the Shroyers. Under Petitioner's employment contract of July 1, 1954, he was given full power and authority to defend that equity suit, against the Shroyers, in any way his judgment might dictate, and plans were made immediately, for that defense, accordingly, under the advice given him by his clients at that time: That is, to fight the case aggressively to the "bitter end", in order that *they might be cleared of any stigma* which might be attached to such a charge, and also on what was threatened, at the time, as an embezzlement charge in the Criminal Court of the District of Columbia —which actually developed later as Criminal No. 713-56 (R. 79-90).

Thereafter, about August 1954, Petitioner was engaged by Raymond O. Shroyer to look after his interests and defend him in whatever action might be taken against him in the Criminal Court, or otherwise, in the District of Columbia. Mary Shroyer, his wife, guaranteed that written contract of employment for Petitioner's fees and expenses, as provided for therein, and by that contract's provisions Petitioner was given full power and authority to conduct the defense of Shroyer *in any way his judgment might dictate*, in any court or courts to which his judgment might dictate, or deem the defense should be pursued, in order to clear their names and show that Raymond O. Shroyer *had never embezzled one dime*, as he had assured Petitioner, and that the built-up charge by the District Supply, and others, was done for revenge, through its President,

Charles Visek. Shroyer had left the District Supply about August, 1953, and started his own business, known as the Ray Supply Company, dealing in buying and selling janitors supplies, and that Company was a very strong competitor of the District Supply.

In the defense of the Equity Suit in Maryland, the District Supply was charged by the Shroyers as having spread around through its officers and agents, and others, that he (Shroyer) had embezzled funds of the District Supply, and that rumor or charge soon reached his creditors, who began to press him quite hard, and he then employed Petitioner, under another written contract, to represent the Ray Supply Company in an effort to have his creditors hold off until that Equity Suit at Rockville, Maryland, might be settled. About April 1955, the Ray Supply Company became a partnership, and Caraway became a partner, with his wife, Celia M. Caraway, one of the Respondents herein. The Caraways resided in Virginia. So, then the Ray Supply Company was owned sixty percent by the Shroyers and forty percent by the Caraways. James Lewey Caraway was duly served in the District of Columbia; the personal service made on his wife in Virginia was quashed, but she was not dismissed as a defendant in the case until the Order of June 1, 1961, by Judge McGuire, *dismissing the action with prejudice against all defendant* (See *California Brewing Company Case*, 19 F.R.D. 179).

Count Seven (7) brought into the case, Stanley Visek, Porreca, Young, Smith and Hilland. Stanley Visek was Vice President and Treasurer of the District Supply; Porreca was a former Director and employee of District Supply; Young was a Director and General Manager; Smith was a

former Accountant of the District Supply. Hilland was brought into the case as he was charged with joining the conspiracy, working in concert with others, and aiding and abetting in such conspiracy, directly, personally, and indirectly through agents and others, to injure and damage Petitioner under the planned objective, scheme and purpose of the conspiracy.

After Petitioner was discharged by the Shroyers, Hilland, who had previously been an Associate of Walter B. Guy, the Senior Member of the law firm of Guy, Mann and Guy, whose law firm was then in the Tower Building, but formerly in the Woodward Building, was engaged as an attorney by the Shroyers, through the efforts of the law firm of Guy, Mann and Guy, and thereafter became, openly, Petitioner's successor as Shroyers' Attorney. About November, 1956, Hilland entered his appearance in the *Criminal Case against Raymond O. Shroyer*, and also one Thomas M. Kindness, an Associate in Hilland's Office at the time; thereafter, in the Equity Case at Rockville, Maryland, Hilland and one Mack (also an Associate or an employee of Hilland) entered their appearances for the Shroyers in that case (1957). The allegations in Petitioner's case show that the objective, purpose and scheme of the conspiracy to damage Petitioner was brewed and hatched about July 1956 and concretely put in its appearance by a letter of August 28, 1956, written by Osborne, addressed to the Shroyers (before Petitioner was discharged), which suggested and directed therein that the Shroyers engage one Beatty (Osborne's attorney) to supersede Petitioner. So, from there the Shroyers went to one Artis in the Tower Building, and from Artis to Guy, Mann and Guy, and from that law firm to Hilland. Louis H. Mann interviewed Raymond O. Shroyer first, upon

being introduced by Artis, then Guy took over on the 10th day of September, 1956, before Petitioner was discharged by the Shroyers, and from Guy 2d Shroyer was taken to Hilland on the 20th of September, 1956, according to the record (See depositions of Osborne, Beatty, Mann and Guy 2d, Shroyers, Hilland and Mack, O/R). Osborne's letter is Exhibit No. 1 for Petitioner in Deposition of Mary K. Shroyer, taken in Baltimore about May 3, 1959, *after much opposition had been set up.* Hilland and Mack are both residents of Montgomery County, Maryland, and have law offices at Rockville, where that Equity Case was instituted against the Shroyers. The record shows that on September 18, 1956, Mann requested Petitioner to turn over to him all records and files in the Shroyers' matters that were in his possession, in order that they might proceed with the matters, for the Shroyers, but for some reason, or no reason, that firm changed its mind about representing the Shroyers *directly and openly* (See O/R, P/T/S).

The record shows Galiher and Meatyard, both of whom represented the District Supply, Charles Visek, its President, and others, with Hilland and Mack, and others, were working in concert, together, to get Petitioner out of the cases and matters of the Shroyers in order that they might settle all controversies between the Shroyers and the District Supply, and others, on their own terms, *and to their financial advantage.* The indictment that was handed down by the Grand Jury on July 16, 1956, found only probable cause for embezzlement against Raymond O. Shroyer for an amount of about $6,000.00, whereas the District Supply claimed in the equity suit that Shroyer had converted illegally about $22,000.00, *and forced the Shroyers through the criminal proceedings to pay the District Supply about*

$12,000.00 by and through that equity suit, under a consent judgment, after Petitioner was discharged, the criminal case dismissed for lack of evidence and a failure of the prosecuting witness to prosecute—also after the Counter-claims and Cross-claims of about a million and a half dollars of the Shroyers against the District, Supply and others in that equity case had been agreed to be dismissed.

Count Eight (8) as amended against Hilland (R. 86) asked the *Trial Court* to impound certain papers, documents and records, pertinent and materially necessary to Petitioner for his use in preparation for trial of the instant case, and for other relief, which records had been turned over to Hilland by the Shroyers on or about November 1, 1956, for the defense of the criminal case—said records having been turned over to Shroyer by Petitioner, under the Court's direction, for such defense (see O R). Counts Eight and Nine as against Hilland were further dismissed *under orders of March 7 and September 15, 1959* (R. 77, 78).

Counts Ten (10) and Eleven (11) were counts (R. 2, 96-102) proposed against Ferdinand J. Mack and William J. Donnelley, Jr. (an employee of Galiher at that time); Mack was an employee or an Associate in Hilland's office, after Kindness had left, about January, 1957. These proposed counts charged Libel and Slander against Petitioner committed maliciously in argument of the instant case, in the *Trial Court*, to prejudice the court in their favor, and Petitioner charged that the false statements were irrelevant, impertinent and immaterial, to the question and issues before the *Trial Court* at that time. The *Trial Court* refused to allow these counts (R. 96-102) to be filed, and Mack and Donnelly added. Obviously, the *Trial Court* determined the *matter of privilege and malice on procedural*

matters and before trial, thus violating the Federal Rules *on avoiding multiplicity of suits and actions*. For the *Trial Court* stated on the hearing of the motion to deny bringing in the new parties that it was *clearly libelous and slanderous, "unless privileged"*, and Galiher, on behalf of his clients admitted that fact (R. 107).

There was a great deal of unnecessary delays created in the progress of this case in the *Trial Court*, due primarily to the Respondents *fighting bitterly every step of the way*, by refusing to answer questions, properly, under Rule 33 (FRCP) and forcing Petitioner finally to use the expensive method of taking depositions; then witnesses moved to *quash subpoenas* and *Notices* to appear for taking of their depositions, and thus effecting wastage of time and expense, contrary to Rule ONE. For example, the Shroyers created great confusion and wastage of time in Baltimore, and locally, through their attorneys Re the taking of their depositions, *when personal service upon them had been quashed*, in the instant suit, *and by asking for affirmative relief* (R. 39-43). Motions to dismiss the Amended Complaint, filed on October 5, 1957, by District Supply and others, were overruled; *Caraway then moved to strike, but that was overruled by Judge Holtzoff*, (Ap. G), and then answers were filed setting up generally a denial of all essential allegations in the Amended Complaint (117-119). That made an issue so far as the District Supply, Charles Visek and Caraway were concerned. Witnesses Donnelly and Galiher asked for extension of time within which to take their depositions and obtained it; they also moved to quash service of subpoenas served upon them (R. 3, 4). Witness Meatyard also moved to quash service of subpoena and Notice to take his deposition, and held up matters for many months. Witness Beatty moved to quash service

of subpoena and Notice to take his deposition, also; he, too, is a Marylander. Hilland and Mack followed suit and caused great delays and wastage of time and effort. Certain Respondents have charged however, that Petitioner caused all of the delays and wastage of time—*and the filling up of the record unnecessarily. The record itself brands the latter as false.*

Moveover, when what appeared at the time, the last two witnesses to be deposed under Rule 26 (FRCP) in the case, they did not appear (Young and Carlin). When these matters came before Judge McGuire, he did not aid Petitioner; but his action taken brought about further confusion and wastage of time, contrary to the Rules and the law—and justice (R. 24, 25). No relief was given Petitioner by that Order of April 18, 1961 (See O/R), but *the Trial Court* imposed further unjust hardships upon him. *Sua sponte* that Order set this case down for *Pretrial and Trial*, and directed this Petitioner to amend his complaint to conform to the Federal rules by May 16, 1961, when there were motions pending in the case *and it was not at issue as a whole* (see Ap. I); one defendant had defaulted and a judgment had been standing against him since May 3, 1958 (R. 119). The case was at issue against District Supply, Charles Visek, Stanley Visek, Porreca, Smith and Caraway (Defendants No. 3, 5, 6, 10, 11, 13).

On February 18, 1959, Judge McGuire entered an order delaying (R. 7, 21-23) the taking of Witness Newton's deposition, and *sua sponte* directed from the bench on February 13, 1959, when Petitioner was neither represented nor present, nor given proper notice of the hearing, *that the case be tried on Wednesday, April 15, 1959, and that all discovery be completed by that date.* The order when

signed, however, stated only that discovery be completed and a certification for trial be executed. See letter in file (R. 21-23) in this connection, addressed to Judge McGuire, with proposed counter order, at the bottom of which is this notation: "What I said at the time is incorporated in the order. McGuire 2/19/59." Petitioner moved to vacate that order, or so much of it as did not affect the continuance of Newton's deposition, but so far as the record shows, no formal order was ever entered upon that motion (See O/R).

On May 16, 1961, a preliminary hearing was had before the Pre-Trial Examiner, a Pre-Trial Statement had been filed with him by the Petitioner on May 12, 1961, four days before, as directed by the Assignment Commissioner (Ap. I and J) and in accordance with the Local Rule (R. 37, 38); and on that date, the 16th day of May, 1961, *certain defendants only* (to-wit, District Supply, Charles Visek, Stanley Visek, Young, Porreca and Smith, with Caraway) presented their Pretrial Statements (R. 196-199)—not timely and not in accordance with the Local Rules—to the Pre-trial Examiner. Petitioner noted an exception and asked for judgment by default in line with Local Rule 12 and Pretrial Instructions to Counsel of January 29, 1960; and, then, Petitioner asked for the matter to go before the Pre-Trial Judge, in accordance with the Local Rule. At that time, however, the Pretrial Examiner contended that he had discretion in the matter as to whether he should default the defendants for not having timely filed their pretrial Statements. The Pretrial Judge being absent from duty on that date, owing to illness as reported, and over Petitioner's objections, the Pretrial Examiner took the matter before Judge McGuire, and Judge McGuire would not continue the matter until the Pretrial

Judge returned to duty, whereupon certain proceedings were had before Judge McGuire (R. 14-21). See letter in file of Pretrial Examiner, dated and filed on September 5, 1961, and also the Pretrial Statements (R. 6, 187-200).

On May 16, 1961, Judge McGuire permitted Young (R. 14-20, 26, 27) to file a motion to set aside the default judgment of *May 3, 1958*, against him, and after some strenuous arguments and colloquies, he did allow Petitioner his five days (under local rule) to file an objection, to Young's Motion to vacate judgment under Rule 60(b) (FRCP). *But the record shows that Judge McGuire had his mind already made up to set that judgment aside, whether he had the power to do it or not* (R. 20).

> "THE COURT: My disposition was not only to let it be filed but to grant the motion to remove the default in the circumstances as presented here. However, I will let it be filed: give you your time to answer it whatever way you want to but, in the meantime, I again reiterate, repeat and recapitulate that you must file a complaint that is succinct and condensed in conformity with the rules and, if you don't, I will dismiss the cause."

Petitioner promptly filed his objections, showing no jurisdiction to set aside the default judgment against Young of more than three-years standing (See Ap. J) *but it was overruled;* and under date of May 26, 1961, an Order was entered directing the default judgment against Young be set aside and vacated, and that the verified answer of Young be filed forthwith (R. 26, 27, 121-123). Judge McGuire there set aside another Judge's Order, which is contrary to practice in the *Trial Court*, had no hearing on

the *OPPOSITION of Petitioner*, and such action as that is contrary to well-established law and practice.

On May 26, 1961, Petitioner left with the *Pre-Trial Judge* a Motion (See Ap. 1) for Extension of time within which to complete discovery proceedings in the instant case, before 10:00 A.M., in view of the new developments, and it was filed by that Judge's Clerk in Petitioner's presence before 11:30 A.M., *on that date, and that motion asked for other relief* (R. 35-39). That Motion was never acted upon, *and it is still pending*. Petitioner's Motion to vacate order of September 15, 1959, dismissing the Eighth and Ninth Counts against Hilland, as amended, has never been acted upon, so far as the record shows (R. 4).

On May 25, 1961, Judge McGuire passed another order directing Petitioner to file "an Amended Complaint to conform *with the spirit and the letter of the Federal Rules of Civil Procedure within ten days from May 16, 1961, and upon failure to so do* this cause *will be dismissed with prejudice.*" (R. 34)—WHEN THIS CASE WAS AT ISSUE AGAINST SIX DEFENDANTS AND A DEFAULT JUDGMENT HAD BEEN STANDING AGAINST YOUNG SINCE MAY 3, 1958. Petitioner filed a Motion on June 10, 1961, to set aside and vacate order of June 1, 1961, *dismissing this action with prejudice against all defendants*, but it was denied (R. 28, 34).

REASONS FOR GRANTING WRIT

Rule 19 of this Court suggests that a Writ of Certiorari may be granted where there are special and important reasons therefor shown by the Petitioner: (1) Where Court of Appeals has rendered a decision on the same

or similar matters in conflict with another Court of Appeals, and where a Court of Appeals has decided a Federal question or questions in conflict with applicable decisions of this Court; (2) Where a Court of Appeals has decided an important question of federal law that has not been decided but should be settled by this Court; and (3) Where such Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the *Trial Court*, as to call for an exercise of this Court's supervision.

A—Point One

By affirming the Trial Court's rulings and judgment *dismissing the action with prejudice against all the defendants*, in the instant case, the *Court Below* has rendered a decision not only contrary to other Circuit Courts of Appeal but even contrary to decisions in its own Circuit, and also contrary to well-established law under this Court's decisions. The Federal Rules of Civil Procedure have been flouted and ignored, as well as the Local Rules of the *Trial Court*, by the *Trial Court*, and the *Court Below* has sanctioned and approved such practice and procedure. These are questions of such great importance, as a procedural matter, that they should be reviewed by this Court and rectified. The Federal Rules were approved by this Court and enacted into law by Congress (28 U.S.C. 2072). This Court has, recently, recognized the importance of such procedural questions and has granted a Writ in *Societe Internationale etc.* v. *Rogers*, 357 U. S. 197 (reversing 243 F. 2d 254, 100 U.S. App. D.C. 148), 2 L. Ed. 2d 1255; also in *Pollor* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, reversing both lower courts. Cf. *Knetsch* v. *U.S.*, 364 U.S. 958, 5 L. Ed. 2d 128, 81

S. Ct. 132; *Mitchell* v. *Roberts DeMario Jewely, Inc.*, 361 U.S. 288, 4 L. Ed. 2d 323, 80 S. Ct. 332; *American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6, 95 L. Ed. 702, and 19 A.L.R. 2d 738.

B—Point Two

The fundamental *due process of law* is that parties to controversies are entitled to have them determined by *an impartial tribunal* (*Lee* v. *Flemming*, 158 F. 2d 984; Appeals should be decided upon their merits alone (7CA. 1961), 289 F. 2d 382. A *dismissal without trial*, such as this, is reversible error (*Castleman* v. *Alamo Plaza, Inc.* (6CA, 1961), 296 F. 2d 524; *Independent Production Corporation* v. *Loew's Inc. et al* (2CA. 1960), 283 F. 2d 730. *Gill* v. *Stolow* (2 CA. 1957), 240 F. 2d 269; *Syracuse Broadcasting Corporation* v. *Newhouse* (2CA. 1959), 295 F. 2d 269; *Nagler* v. *Admiral Corporation et al.* (2CA. 1957), 248 F. 2d 319): And Cf. *Lyford* v. *Carter* (2CA. 1960); 274 F. 2d 815 and *Kuzma* v. *Bessemer and L. E. R. Co.* (3CA. 1958), 259 F. 2d 456. That order of June 1, 1961, was too drastic.

The matters involved herein are very similar to those involved in *Padovani* v. *Bruchausen* (2CA. 1961), 293 F. 2d 546, cited in the *Syracuse Case*, supra, where a Mandamus issued, and that Court said:

> "Nevertheless, we do have an overriding responsibility to see that justice is done between litigants before the court. (citing authorities, including the Gill, Independent Production, Sociate Internationale etc., Cases, supra) And it would seem a part of ise judicial economy, if not necessity, to meet that issue

now without subjecting the parties and the court to the delay and burden which would be caused by the ultimate reversal clearly indicated."

In the *Gill Case*, at p. 670, that Court said:

"Reluctant as we are to interfere, we feel that this is an occasion where viewed with the hindsight afforded us *by a study of the entire record, the penalty assessed is too drastic and the case must be returned to accord defendants a trial of the seriously contested issues of facts involved.* In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court *except upon a serious showing of a willful default.*"

These principles of law, as laid down there, show justice done and such principles are contrary to the holdings of the *Court Below*, wher it approved and affirmed the rulings of the *Trial Court. In Societe Internationale Case*, supra, there was involved questions of Federal Practice and Procedure and this Court granted a writ (reversing the lower courts).

In the *Pollor Case, supra*, decided (1962), at p. 473, this Court said: (Reversing the lower courts)

"We believe that summary proceedings should be used sparingly in complex litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot (citing *Kensil* v. *Silas Mason Co.*, 334 U.S. 249 and *Arends* v. *U.S.*, 322 U.S. 419)."

C—Point Three

Now as to the pleadings of Petitioner being sufficient or insufficient, and the rulings of Judge McGuire being a gross abuse of discretion to order them amended under the circumstances and fact issues, here are cases that should control, definitely: In *Marty* v. *Grasselli Chemical Co.*, 303 U.S. 197, 58 S. Ct. 507, 82 L. Ed. 745 (Rule 8(a)), this Court held:

> Pleadings are intended to serve as a means of arriving at a fair and just settlement of controversies between litigants. They should raise no barriers which prevent the achievement of that end. (See *Conley* v. *Gibson* (1957), 355 U.S. 41, 2 L. Ed. 2d 80, citing that principle of law with approval as set forth in the *Marty Case*.)

In *Duller* v. *De Butterville* v. *Scoville* (9CA, 1956), 239 F. 2d 824, that Court (citing 23 U.S. 246, 252 U.S. 286, and the *Albertson Case*, 182 F. 2d 397), it was held:

> Subsequent pleadings of an adversary if not thereafter denied may cure a defect in the prior pleadings, both as to substantive and procedural admissions.

And in the *Albertson Case*, at p. 401, the *Court Below* said:

> "A defect in pleading even of matters of substance, may be aided and cured by the pleadings of an adverse party (authorities shown). And under modern procedural methods *pleadings are not to be struck down for non-prejudicial deficiencies.*"

See Petitioner's Printed Petition (with authorities therein shown) for a Rehearing, filed May 11, 1962 (R. 129-136). *Fair notice to defendants in modern procedural methods of pleadings is all that is required in a complaint today* (Barron and Holtzoff, Fed. Pro., p. 65, Sec. 255). See also Petitioner's Pre-Trial Statement, filed with *Pre-Trial Examiner* on May 12, 1961 (R. 187-199, see also O/R) When Judge McGuire directed that the pleadings be amended and that the parties start all over again to make issues when six (6) defendants had joined issues on the pleadings as they stood, *the whole case was blocked*. See *U.S.* v. *White County Bridge Commission etc.* (7CA, 1960), 275 F. 2d 529, at p. 535 *and Moore's Fed. Prac.*, 2d Ed., Vol. 2, p. 1711.

When Judge McGuire put pressure on Petitioner in order to clear the Docket, he ran in conflict with *Slagle* v. *U.S.*, 228 F. 2d 673 (5CA, 1956) (R. 11, 31).

D—Point Four

As to the many questions raised in the *Court Below* (R. 127), which that Court ruled as "MOOT", it is submitted *that ruling* is contrary to the well-established law of the land. In *Reserve Life Insurance Co.* v. *Frankfather*, 225 P. 2d 1035, 123 Col. 77, 39 A.L.R. 2d. 146, it was held: There are no "moot issues" or questions *where there are substantial rights or issues controverted in a case*. Certainly, in the instant case, *there were substantial rights and issues controverted* in the various questions raised in the *Court Below*, as set out in Petitioner's Printed Brief (9 copies of which are filed herewith under Rule 21(4) of this Court, with printed record (R. 1-123). Where a case is dismissed, as was instant case, by the *Trial Court*,

with prejudice, such a case should be looked at particularly with regard to its own procedural history (*Sandee Manufacturing Co.* v. *Rohm and Haas Co.* (7CA, 1962), 298 F. 2d 41). Cf. *Marshal* v. *Sawyer* (9CA, 1962); 301 F. 2d 639, citing *Conley Case, supra*. In *Preble* v. *Johnson etc.* (10CA, 1960), 275 F, 2d 275; it was held: A Court of Appeals should not dispose of cases on technicalities, save where compelled to do so under jurisdiction or by requirements of orderly judicial administration. See Opposition of Petitioner, filed May 22, 1961, to Young's Motion to set aside default judgment of May 3, 1958, and authorities cited therein (O/R). *Judge McGuire had no power under Rule 60(b)*, or otherwise, to set aside that default judgment against Young (Ap. J). In *Federal Deposit Insurance Co.* v. *Alker* v. *Welsh etc.* (3CA, 1956), 234 F. 2d 113 (on Rule 60 (b)), at pp. 116, 117, it is said:

> "It is the basic duty (of DJ) to determine whether he has power before he assumes to exercise it. He is bound just as we are to interpret and apply the Federal Rules of Civil Procedure which have the force and effect of Statutes and are binding upon him." (See 340 U.S. 193 and other authorities cited therein).

And, further,

> "We are clear, however, that the use-plaintiffs are entitled to retain full benefits of their judgment until the defendants have established by satisfactory evidence that they are entitled under Rule 60(b) to relief therefrom. Judge Welsh did not hold such a hearing. He made no such findings or conclusions. *** Moreover, he failed to follow the express directions of this Court that he should also decide the jurisdictional

question, that is, *whether the motion was one which Rule 60(b) empowered him to grant.*" (See authorities therein)

Judge McGuire in the instant case passed on the motion of Young, *arbitrarily and capriciously*, without using sound judicial judgment, and made no findings of fact or conclusions of law (R. 26, 27). See, also, *Woods* v. *Cannady* (DCCA, 1946), 158 F. 2d 184.

E—Point Five

Now, as to the *Court Below* being in error when it held, in effect, that Petitioner had been afforded fair and impartial hearings in the *Trial Court* and that he had not been deprived of *due process of law and a jury trial on the merits of the case*: See authorities cited in Printed Petition for a Rehearing, nine (9) copies of which are filed herewith, pursuant to Rule 21(4). (R. 129-135). See *Hovey* v. *Elliot*, 167 U.S. 409, and *Barber* v. *Tuberville* (DCCA, 1958), 218 F.2d 34, on jury trials after *default judgment*, for damages. And Cf. *Last Chance Mining Co.* Case cited in *Woods Case, supra*, *Duling* v. *Markun* (7CA, 1956), 231 F. 2d 833 and *Ferguson* v. *Bartel Brewing Co.* (2CA, 1961), 284 F. 2d 855; also, 77 A.L.R. 2d 1492, 1419 (n).

ARGUMENT

The basic question here is whether the *Court Below* was justified, as a matter of law and justice, in holding that the *Trial Court* was *justified in dismissing Petitioner's action with prejudice*, when seven (7) Respondents had answered

the amended complaint, as drafted, and there were motions before the Trial Court pending that had not been acted upon (See Ap. I). Petitioner says it was reversible error for the *Court Below* to do so, and that there was no flagrant refusal to follow the *sound and judicial direction* of the *Trial Court*. The *Trial Court* had violated the Statutory Rules of his own court, the Federal Rules of Procedure and ignored the construction of those rules by other Federal Courts, not only the spirit and intent of those rules, but the letter itself (R. 35-39, 28-33). After the matter was before the Pre-Trial Examiner, on the 16th day on May, 1961, and Pre-Trial Statements were filed with the Examiner, all matters should have gone before the Pre-Trial Judge that the Examiner could not dispose of under the Local Rules and in accordance with Local Rule 12 and Pretrial Instructions to Counsel of January 29, 1960 (Pine, CJ.). These Rules of Practice were promulgated, pursuant to Rule 83 of the Civil Rules of Procedure, and under Statutory Law, and should have been followed, unless they are meaningless.

When Judge McGuire acted upon and set aside another Judge's Order (Default Judgment of May 3, 1958 (Keech, J.), it was done contrary to long established practice in that Court. After a case had gone to the Pre-Trial Examiner, for proper action under those pretrial rules and instructions, as established by statutory law, the case was out of the jurisdiction of the Motions Judge. Those Pre-Trial Rules and Instructions are plain enough to understand, and should have been followed. It was reversible error on the part of the *Court Below* to affirm such erroneous actions taken and rulings made in the *Trial Court*. See Rules 38(a) and 83 (FRCP)—See Ap. I. Judge McGuire wanted to clear the Docket, whether it was justice and the

law, or not, no matter how prejudicial it might be to the Petitioner, nor how damaging, nor how contrary to Rule ONE, and the *Slagle Case*, it might be. In the *Slagle Case*, *supra*, at p. 679, that Court said:

> "The clearing of court dockets is one of the desiderata in the judicial function. But it should not be allowed to become a fetish for it does not rank with the raison d'etre of court,—the administration of justice based upon a full and fair disclosure of facts." (Case reversed)

That is the law today and what the Federal Rules of Civil Procedure intended, not only by the letter, but the clear intent and spirit; as set out in *Hickman v. Taylor*, 329 U.S. 495, at p. 501, where this Court said: Under the new rules (FRCP) a litigant must be allowed "fullest possible knowledge of the issues and facts before trial" (R. 134).

When the *Court Below* refused to *Rehear and Reconsider* its judgment and rulings of April 26, 1962, affirming the judgment of the *Trial Court* in *dismissing with prejudice* the action against all the defendants therein, its action taken was contrary to well-established law and justice as set out in the printed petition of Petitioner asking for a Rehearing, filed on May 11, 1962 (R. 129-136). When the *Court Below* held that the *Trial Court* was right in dismissing Counts Eight (8) and Nine (9) against Hilland by calling the question raised as "moot", it was reversible error under the principles laid down in *Miles v. City of Chandler* (9CA. 1961) 297 F. 2d 690, 5 F. R. Serv. 2d 54b.4, Case 3. This case involved the question where claims of multiple parties were concerned and

where a claim against one of them was not appealable. Cf. *Hardy* v. *Barkers Life and Casualty Co.* (7CA, 1955), 222 F. 2d 827, and *Federal Savings and Loan Association of Bremerton* v. *U. S.* (9CA, 1961), 295 F. 2d 481, setting forth *verbatim* Rule 54(b) as amended July 19, 1961. When the Shroyers asked for affirmative relief in the *Trial Court*, and also in the *Court Below*, they submitted themselves for all purposes to the question of jurisdiction in this case. In *Northbranch Products, Inc.* v. *Fisher* (DCCA, 1960), 284 F. 2d 611, citing the *Haddon Case*, and other authorities, it was held: Where affirmative relief is asked for as the Shroyers have done in instant case, both in the *Trial Court* and the *Court Below*, they have waived jurisdiction and submitted themselves for all purposes in this case (See R. 40-43 and O/R).

The questions involved herein, in general, are of the greatest and most material importance on practice and procedure, so far as arbitrary and summary judgments are concerned, under the Federal rules of Practice and Procedure, as well as the Local Rules of a District Court, *promulgated pursuant to Statutory Authority* (28 U.S.C.); and this Court, accordingly, should find it of such importance as to grant this writ of certiorari sought, in line with *Societe Internationale etc. and Pollor Cases*, supra, and other authorities shown, where the *Court Below* has passed judgment and held contrary to other Circuit Courts of Appeal and contrary to the law as laid down in this Court's decisions.

In view of the fact, moreover, that the *Companion Case* from the Fourth Circuit (No. 1029, October Term, 1961, filed 6/11/62) has been referred to in the Opinion of the *Court Below* and undoubtedly has been given some con-

sideration in drawing its conclusions in instant case, and since both cases with all *the Original Records* (in both cases) are now before this Court with a Petition for a Writ of Certiorari, it is suggested and requested that the two cases may be considered and passed on together, as it is elementary law that any errors or questions may be considered by this Court whether raised or not, at its discretion, in order to do justice *between man and man.*

CONCLUSION

For the foregoing reasons and authorities cited, this Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted, in order that this case may be reviewed and justice done Petitioner.

Respectfully submitted,

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NOTE: EMPHASIS ADDED:

O/R—Original Record;

R.—Certified Record from Court Below;

Tr. Pro.—Transcript of Proceedings in *Trial Court;*

Ap.—Appendix.